

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Illinois-American Water Company	)	
	)	
Approval of its annual reconciliation of	)	ICC Docket No. 09-0151
Purchased Water and Purchased	)	
Sewage Treatment Surcharges	)	
Pursuant to 83 Ill. Adm. Code 655.	)	

**THE PEOPLE OF THE STATE OF ILLINOIS’S MOTION TO STRIKE  
PORTIONS OF IAWC EXHIBITS 1.0 SR and 2.0SR.**

The People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois (“the People”) request that the Commission strike substantial portions of IAWC’s Surrebuttal Testimony. The testimony and exhibits subject to this motion to strike discuss matters arising after the 2008 reconciliation year or purport to address issues raised by AG witness Dennis Streicher in his Rebuttal Testimony. However, a review of AG Exhibit 3.0 on Reopening (Corrected),<sup>1</sup> reveals that in fact, Mr. Streicher did not make the statements or references Mr. Kerckhove and Mr. Hillen attribute to him. Accordingly, much of Mr. Kerckhove’s and Mr. Hillen’s testimony is beyond the scope of Mr. Streicher’s rebuttal testimony as well as irrelevant, beyond the scope of this docket, and in some cases, hearsay.

The People request that the following portions of the testimony and exhibits be stricken:

---

<sup>1</sup> This testimony was originally filed on August 20, 2010. However, two errors were found in the course of discovery, and a corrected copy was filed on October 18, 2010.

IAWC Ex. 1.0SR	IAWC Ex. 2.0SR
IAWC Exhibit 1.0SR, pages 14-15, lines 329-331	IAWC Exhibit 2.0SR, pages 4-7, lines 80-136, IAWC Exhibits 2.04SR, 2.05SR(a), 2.05SR(b) and 2.06SR
IAWC Exhibit 1.0 SR, pages 15-17, lines 340-388, IAWC Exhibits 1.11SR, 1.12SR(a), 1.12SR(b), 1.12SR(c), 1.12SR(d) and 1.13SR	IAWC Exhibit 2.0SR, pages 9-10, lines 197-210.
IAWC Exhibit 1.0 SR, page 18-19, lines 416-427.	IAWC Exhibit 2.0SR, pages 12-13, lines 273-275.
IAWC Exhibit 1.0 SR, pages 19-20, lines 428-452, IAWC Ex. 1.14SR.	IAWC Exhibit 2.0SR, page 13, lines 276-284, IAWC Ex. 2.09SR.

### Discussion

**I. IAWC Exhibit 1.0 SR, page 14-15, lines 329-331; page 15- 17, lines 340-388; IAWC Exhibits 1.11SR, 1.12SR(a), 1.12SR(b), 1.12SR(c), 1.12SR(d) and 1.13SR**

Before launching into an extended discussion of an irrelevant, July 2010 event, IAWC witness Rich Kerckhove attempts to tie it to Mr. Streicher’s rebuttal testimony by saying that Mr. Streicher “attempts to bolster his criticisms of the Company by comparing both IAWC’s water use and sewer operations to practices of the City of Elmhurst. In most cases, however, such comparisons are of little value because the comparisons fail to recognize the fundamental differences between the Elmhurst water and sewer systems and the Company’s water distribution and sewer collection systems.” IAWC Ex. 1.0SR at 14-15, lines 329-331. A review of AG Exhibit 3.0 on Reopening,

however, shows no comparisons of the operation and practices of the City of Elmhurst systems to IAWC's systems.

In fact, Mr. Streicher refers to the practices of the City of Elmhurst in regard to only two issues: On page 2-3, lines 12-30 of AG Exhibit 3.0 on Reopening, Mr. Streicher discussed the City's tracking of authorized but unbilled water related to firefighting, street sweeping, and sewer flushing, while pointing out that contractor uses and irrigation are metered. On pages 8-9, lines 147 – 173 of AG Exhibit 3.0 on Reopening, Mr. Streicher addresses the actions taken by the City of Elmhurst to address inflow and infiltration from private property ("private I/I"), taking information from responses to IAWC's data requests to the People. On page 5, line 75 of AG Exhibit 3.0 on Reopening, Mr. Streicher referred to the agreement between IAWC and the City of Elmhurst, but did not discuss any practices or operations of the City of Elmhurst. Mr. Streicher did not compare the operation of the City of Elmhurst sewer collection system to IAWC's system at any point in his Rebuttal Testimony. Mr. Kerckhove's statements and testimony to the contrary misrepresent Mr. Streicher's testimony.

Starting at page 15, line 340 and continuing to page 17, line 388, Mr. Kerckhove purports to provide "an example of Mr. Streicher's comparison of the Company's sewer collection system to that of Elmhurst." He refers to Mr. Streicher's testimony "beginning on line 76 of this rebuttal testimony." (IAWC Ex. 1.0SR at 15, line 345.) However, when one reviews that line, the only reference to the City of Elmhurst is identifying it as the counter-party to the Agreement with IAWC. Mr. Streicher describes that agreement,

and explains that it allows a reasonable amount of I/I.<sup>2</sup> The operation and practices of the City of Elmhurst are not mentioned.

Mr. Kerckhove's citation to page 76 gives the impression that Mr. Streicher did in fact compare the City of Elmhurst's system to IAWC's system. This is simply wrong. Mr. Kerckhove's extensive discussion of flooding that took place in July 2010, and citation of newspaper articles, City memos, and other material are hung on this phantom testimony, and should be stricken as beyond the scope of Mr. Streicher's testimony.

In addition, the discussion of events occurring in July 2010 is clearly not relevant to the issues in this docket, which is a prudence review and reconciliation of 2008 purchased water and sewage treatment. The July 2010 events post-date the relevant time period by about 20 months and do not involve IAWC's system or any system that Mr. Streicher "compared" to IAWC's system. They are not relevant to the review and reconciliation of IAWC's 2008 purchased water and sewage treatment costs and rates and should not be admitted into the record.

Further, IAWC Exhibits 1.11SR, 1.12SR(a), 1.12SR(b), 1.12SR(c), 1.12SR(d), and 1.13SR contain newspaper articles, City memos, and other material that purport to describe the situation arising from the rain in July 2010. The subject of the articles and the other documents are irrelevant to the issues in this docket. Further, they are

---

<sup>2</sup> Specifically, the question and answer that includes line 75 are:

**“ Q. Do you maintain that IAWC should be obligated to eliminate all I/I from its system?**

**A.** No. I recognize that there is always a certain amount of I/I in a sewer system. That is why the Agreement between IAWC and the City of Elmhurst allows for significantly high flows before the surcharge applies. Specifically, approximately 130,000 gallons of potable water are delivered to the Country Club District every day, which translates into 90/gallons per minute. The surcharge for excess sewer flow only applies if at least 415/gallons per minute or 600,000 gallons per day are delivered for sewage treatment, more than 4.5 times the rate water enters the system. This allows for a reasonable amount of I/I. Further, IAWC has been aware of the surcharge since it became the owner of the system, and should have managed its system to limit its exposure to the surcharge.”

apparently being offered for the truth of the matter stated in the articles and documents, and therefore are hearsay<sup>3</sup> and should not be allowed into the record.

The testimony at IAWC Exhibit 1.0SR at pages 15-17, lines 340-388 and IAWC Exhibits 1.11SR, 1.12SR(a), 1.12SR(b), 1.12SR(c), 1.12SR(d) and 1.13SR could not have influenced IAWC's behavior in 2008 and cannot be considered by the Commission in connection with determining the prudence of IAWC's actions prior to and during 2008. When evaluating prudence within the context of a reconciliation review, the Commission applies the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management *at the time decisions had to be made*. Illinois Power Co. v. Illinois Commerce Commission, 245 Ill. App. 3d 367, 371 (3d Dist. 1993). The courts and the Commission have been clear that "[i]n determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible." *Id.* at 371. These testimony and exhibits, in addition to being beyond the scope of Mr. Streicher's rebuttal testimony and hearing, arose after the facts available in 2008, "at the time judgment was exercised," and cannot be considered in evaluating IAWC's actions. They should not be admitted into the evidentiary record.

## **II. IAWC Exhibit 1.0 SR, page 18-19, lines 416-427.**

At pages 18-19, lines 416-427, Mr. Kerckhove describes what he calls additional Company actions in connection with IAWC's efforts to "communicate the impact of

---

<sup>3</sup> . Illinois Courts follow the hearsay rule, Village of Robbins v. Village of Midlothian, 41 Ill. App. 3d 899, 901 (1976), and apply the definition of hearsay found in the Federal Rules of Evidence. See Estate of Parks v. O'Young, 289 Ill. App. 3d 976, 982 (1997). Hearsay is a statement, written or oral, not made by the declarant in testimony and offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

unauthorized connections to the collection system and the need for customers [to] remove unauthorized connections.” He describes two telephone conversations with attorneys for the Staff and the People. However, the conversations are not described with any particularity. Mr. Kerckhove does not state who specifically was on the line or when these calls took place, leaving it unknown whether they occurred during 2008 or more recently. Further, it is unclear how conversations with attorneys at an unknown time are relevant to the 2008 reconciliation. Conversations with attorneys and other parties do not reduce I/I – actions in the field do. Finally, assuming the conversations were “an attempt to obtain an agreed-to approach to effectively mitigate unauthorized connections” (lines 426-427), they are irrelevant settlement negotiations and are not competent evidence under the rules of evidence. See Ford v. Grizzle, 398 Ill.App.3d 639, 649 (5<sup>th</sup> Dist. 2010)(“In Illinois, statements regarding settlement negotiations or offers to settle are generally not admissible”). The People request that the Commission reject the testimony at pages 18-19, lines 416-427 as irrelevant, not described with particularity, and as incompetent settlement discussions. This testimony should not be admitted into the evidentiary record.

**III. IAWC Exhibit 1.0 SR, pages 19-20, lines 428-452, IAWC Ex. 1.14SR.**

At IAWC Exhibit 1.0 SR, page 19-20, lines 428-452, Mr. Kerckhove complains about responses to certain data requests that sought information about the City of Elmhurst. Assuming that IAWC’s complaints that the People failed to respond to IAWC’s data requests are true, which they are not, it is clear that such data requests were beyond the scope of Mr. Streicher’s testimony and were therefore properly objectionable. Implicit in Mr. Kerckhove’s complaints is that Mr. Streicher compared IAWC’s

operations and maintenance to the City of Elmhurst's sanitary sewer system (see, e.g., line 434). As discussed above, Mr. Streicher limited his references to the City of Elmhurst to authorized, unbilled water and work with homeowners in connection with private I/I. IAWC did not bring a motion to compel answer to test its position that the People's answers were inadequate.

IAWC attached the narrative of all of the responses to IAWC's third set of data requests as IAWC Schedule 1.14 SR. The attachments to the responses were not included. IAWC witness Kerckhove fails to tie these responses to any issue in his testimony. He evidently offers them to show that the Attorney General interposed objections, which is not a proper subject of testimony. See IAWC Ex. 1.1SR at 19, lines 441-448. The place to challenge objections to data requests is a motion to compel.<sup>4</sup> However, IAWC did not bring such a motion. Both the testimony discussing the responses and the responses themselves should not be admitted to the record as they are irrelevant, they are incomplete, and they are not competent evidence.

**IV. IAWC Ex. 2.0SR, page 4-7, lines 80-136; IAWC Ex. 2.04SR, 2.05SR, 2.06SR.**

Mr. Kevin Hillen filed surrebuttal testimony on behalf of IAWC. At pages 2-7, lines 80-136, Mr. Hillen discussed IAWC's post 2008 actions to address private I/I. As discussed above at page 4, the Commission refuses to consider post period evidence in assessing the prudence of a utility's actions in a reconciliation docket. See, e.g., Illinois Power Co. v. Illinois Commerce Commission, 245 Ill. App. 3d 367, 371 (3d Dist. 1993). Mr. Hillen's detailed description of IAWC's actions in years following 2008 might be

---

<sup>4</sup> Mr. Kerckhove failed to mention that each response was answered, without waiving the objections. He also did not include the attachments provided by the People.

relevant to the reconciliation for those years, but it is irrelevant and beyond the scope of this docket and should not become part of the evidentiary record in this docket.

In addition, Mr. Hillen includes matters that are irrelevant and should not be admitted for the same reasons discussed above in connection with Mr. Kerckhove's testimony about meetings with attorneys for Staff and the People. At page 5, lines 104-108, Mr. Hillen refers to these conversations, but again fails to identify who was present or when the conversations took place. In addition to being long past the end of the reconciliation period, as settlement discussions, these conversations are not admissible. See page 5 above.

Mr. Hillen attached IAWC's responses to certain data requests describing its 2010 actions to his testimony. Specifically, IAWC Exhibits 2.04SR, 2.05SR and 2.06SR all address post 2008 actions, and therefore are not relevant to this 2008 reconciliation. They should not be admitted to the record.

**V. IAWC Ex. 2.0SR, pages 9-10, lines 197-210.**

At IAWC Exhibit 2.0SR, pages 9-10, lines 197-210, Mr. Hillen attempts to question the credibility of portions of the *Direct* Testimony of Dennis Steicher, AG Ex. 1.0 on Reopening. Mr. Hillen and other IAWC witnesses had the opportunity to address Mr. Streicher's direct testimony in their rebuttal testimony. Their surrebuttal testimony is limited to addressing issues contained in rebuttal testimony. This is how issues are narrowed. If a party could ignore the scope of rebuttal and refer back to direct testimony, it would encourage repetition and prejudice parties who play by the rules and expect issues to be narrowed as rounds of testimony proceed. As established at page 2-3 above in connection with Mr. Kerckhove's testimony, Mr. Streicher did not "compare" IAWC's



system to the City of Elmhurst other than to discuss some aspects of authorized unbilled usage and Elmhurst's efforts to address private I/I. Mr. Streicher's testimony about private I/I was directly responsive to Mr. Hillen's rebuttal testimony that the Company was "between a rock and a hard place" in regard to private I/I, AG Ex. 3.0 on Reopening, page 8. He offered the experience in Elmhurst as an example of a city that has addressed this problem since 1988. This testimony did not open the door to a general discussion of I/I in the City of Elmhurst or of the operation of the sanitary sewer system.

The testimony at IAWC Ex. 2.0SR, pages 9-10, lines 197-210 is beyond the scope of rebuttal and should not be admitted into the evidentiary record.

**VI. IAWC Ex. 2.0SR, pages 12-13, lines 273-275.**

At IAWC Ex. 2.0SR, pages 12-13, lines 273-275, Mr. Hillen refers to Mr. Kerckhove's testimony about July 2010 rain events in Elmhurst. For the same reasons that Mr. Kerckhove's post 2008 testimony about the operation of the City of Elmhurst systems should not be admitted, Mr. Hillen's reference to the same events should not be admitted. See pages 3-4

**VII. IAWC Ex. 2.0SR, page 13, lines 276-284.**

Like Mr. Kerckhove, Mr. Hillen makes the unwarranted assertion that Mr. Streicher compared the operation of the Elmhurst sanitary collection system to the operation of the IAWC collection system in his rebuttal testimony. As demonstrated above at pages 2-3 above, Mr. Streicher's testimony did not make that comparison. At page 13 of his Surrebuttal testimony, Mr. Hillen, like Mr. Kerckhove, complains about the responses to data requests and that he was unable to conduct a comparative analysis of IAWC and the City of Elmhurst.

Mr. Hillen also complains about discovery responses and further about his failure to produce an analysis (that is beyond the scope of allowed surrebuttal) at IAWC Ex. 2.0SR, page 13, lines 276-284. These complaints are not evidence and should not be admitted to the record for the same reasons stated at pages 5-6 above in connection with Mr. Kerckhove's testimony. Monthly data for water and wastewater sales for Elmhurst are irrelevant to this 2008 reconciliation of IAWC purchased water and sewage treatment costs. Mr. Hillen does not offer any analysis of this data nor any reason for it to be in the record. IAWC Exhibit 2.09SR, being the People's response to IAWC's inappropriate data request, is also irrelevant, beyond the scope of Mr. Streicher's rebuttal testimony, is not discussed by Mr. Hillen or any other witness, and should not be admitted into the record.

WHEREFORE, for the reasons stated above, the People of the State of Illinois request that the Commission strike and not admit to the record the following testimony and exhibits:

IAWC Ex. 1.0SR	IAWC Ex. 2.0SR
IAWC Exhibit 1.0SR, pages 14-15, lines 329-331	IAWC Exhibit 2.0SR, pages 4-7, lines 80-136, IAWC Exhibits 2.04SR, 2.05SR(a), 2.05SR(b) and 2.06SR
IAWC Exhibit 1.0 SR, pages 15-17, lines 340-388, IAWC Exhibits 1.11SR, 1.12SR(a), 1.12SR(b), 1.12SR(c), 1.12SR(d) and 1.13SR	IAWC Exhibit 2.0SR, pages 9-10, lines 197-210.
IAWC Exhibit 1.0 SR, page 18-19, lines 416-427.	IAWC Exhibit 2.0SR, pages 12-13, lines 273-275.
IAWC Exhibit 1.0 SR, pages 19-20, lines 428-452, IAWC Ex. 1.14SR.	IAWC Exhibit 2.0SR, page 13, lines 276-284, IAWC Ex. 2.09SR.

Respectfully submitted,

People of the State of Illinois  
Attorney General, Lisa Madigan

By: \_\_\_\_\_/s/\_\_\_\_\_  
Susan L. Satter  
Senior Assistant Attorney General  
Public Utilities Bureau  
100 W. Randolph Street, 11th Floor  
Chicago, Illinois 60601  
Telephone: (312) 814-1104  
E-mail: ssatter@atg.state.il.us